Supreme Court, U.S.
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No. 97-

IN THE SUPREME COURT OF THE UNTIED STATES OCTOBER TERM, 1997

DON KING PRODUCTIONS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May Don King Productions, Inc. ("the Corporation"), newly named as a corporate co-defendant in a criminal case, be denied its Sixth Amendment right to confront and clarify potentially damaging testimony given by its owner Don King at his prior trial on the ground that the Corporation is the alter ego of Mr. King whose individual counsel, according to the Court of Appeals, should have protected the Corporation's interest despite counsel's ethical obligation to implement Mr. King's Sixth Amendment right to counsel.

RULE 29.1 LISTING

Don King Productions, Inc., is a privately-held corporation that has no parent companies, subsidiaries or affiliates that have issued shares to the public.

RULE 14.1(b) LISTING OF THE PARTIES

Petitioner is Don King Productions, Inc., appellee below. Don King also was an appellee below. Respondent is the United States of America, appellant below.

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Don King Productions, Inc. ("DKP"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is unreported. It is reprinted in the Appendix hereto. The opinion of the United States District Court for the Southern District of New York is officially unreported, but is available as United States v. King, No. 94 Cr. 455 (LMM), 1997 WL 666778 (S.D.N.Y. October 22, 1997). It is reprinted in the Appendix hereto.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 1, 1997. A petition for rehearing *en banc* was filed on February 9, 1998. The Court of Appeals denied petitioner's petition for rehearing en banc on March 4, 1998. The Court of Appeals issued the Mandate on March 10, 1998. The Court of Appeals had jurisdiction to hear the interlocutory appeal from the District Court under 18 U.S.C. § 3731. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." United States Constitution, Amendment VI.

Rule 801(d)(2)(D) of the Federal Rules of Evidence

provides: "A statement is not hearsay if the statement is offered against a party and is . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . . "

Rule 802 of the Federal Rules of Evidence provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

STATEMENT OF THE CASE

A. Introduction and Summary

The three judges constituting the panel from the Second Circuit agree with Petitioner regarding the significance of the issue presented in this case: "The principal question concerning the admission of King's testimony against DKP is whether the Confrontation Clause applies to protect a corporation, wholly owned by one individual, from admission of statements of the corporation's sole shareholder, made at that individual's prior trial. No prior decision appears to have considered this precise issue." App. A.

In 1994, a criminal indictment charged Don King, alone, with nine counts of violation of the wire-fraud statute, 18 U.S.C. § 1343. Mr. King's 1995 trial ended with a 6-6 hung jury. Immediately after the District Court granted a mistrial in the 1995 trial, the government sought a superseding indictment based on the same facts as the 1994 indictment, and added Don King Productions, Inc. ("DKP"), as a defendant.

In the District Court, the government pressed for the admissibility of all of Mr. King's 2-and-1/2 days of testimony from the 1995 trial. Moreover, the government, in particular, pressed for the admissibility of the following four questions and answers from the 1995 trial:

Q: If this rider was added to the contract, that was done without your knowledge, correct?

A: Yes.

Q: And certainly without your approval?

A: Yes.

Q: And it would have been wrong to add that rider to the contract after Mr. Chavez was injured, correct?

A: Yes.

Q: It would have been deceptive to add that rider to the contract and to submit that contract to the insurance company, isn't that a fact?

A: Yes.

The District Court granted DKP's motion to bar the use of Mr. King's testimony from the first trial in the government's direct case in the second trial. The District Court held that the Confrontation Clause precluded Mr. King's testimony from use against DKP because Rule 801(d)(2)(D) of the Federal Rules of Evidence is not "a firmly rooted hearsay exception," Ohio v. Roberts, 448

U.S. 56, 66 (1980), and the testimony was not given under circumstances establishing "particularized guarantees of trustworthiness," Id. The Second Circuit reversed, holding that the Confrontation Clause is not available when "a corporation, owned entirely by one individual, seeks to preclude the use against it of that individual's testimony from a prior trial." App. A.

The decision of the Second Circuit has serious implications on several levels.

First, the decision of the Second Circuit addresses an issue of first impression with drastic implications for a defendant's right to undivided loyalty of counsel and counsel's ethical obligations to provide such representation.

Second, the decision of the Second Circuit threatens important constitutional rights by erroneously establishing a type of constitutional caste system for those corporate criminal defendants seeking to exercise rights guaranteed by the Confrontation Clause. The one hand, individuals may, presumably, exercise rights guaranteed by the Confrontation Clause upon facts such as set forth in this case. However, on the other hand, some corporate defendants, upon the same facts, may not exercise rights guaranteed by the Confrontation Clause although they may be -- like individual defendants -- indicted, tried, convicted, and punished. This is an unacceptable and extreme position that Oliterates the Confrontation Clause from the Constitution for many corporate defendants throughout this country.

Third, the decision of the Second Circuit is contrary to the important and critical goal of reliability in

criminal trials. As this Court has stated, "The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." Lee v. Illinois, 476 U.S. 530, 540 (1986). Without the ability and the right to confront and to cross-examine witnesses, corporate defendants will become unwilling participants in a criminal-justice system significantly different and less reliable than that which most Americans would agree is the best in the world.

Fourth, the decision of the Second Circuit, if allowed to stand even at this interlocutory stage of the proceedings, is the first step down a slippery slope regarding the diminution of the constitutional rights of corporate defendants.

In sum, the Court of Appeals' opinion affects fundamental constitutional rights -- the right of an accused to counsel, the obligations of counsel for the accused, and the right of an accused to confront witnesses against it -- each with broad implications for the administration of the federal criminal-justice system.

B. Factual Background

Mr. Don King is a fight promoter. Mr. King is the one hundred percent (100%) owner of Don King Productions, Inc. ("DKP"), an S-corporation through which he does business and which is the licensee in the various states in which Mr. King promotes boxing matches.

In 1991, Mr. King, through DKP, sought an insurance policy from Lloyd's of London ("Lloyd's") in the amount of seven hundred fifty thousand dollars

($750,000.00) to protect against any losses that might be caused due to the non-appearance of either Julio Cesar Chavez or Harold Brazier in an upcoming fight. As it turned out, the fight had to be canceled because Mr. Chavez was injured. As a result of the cancellation, a claim was submitted to Lloyd's for reimbursement under the policy for the losses incurred.

DKP submitted a claim for over six hundred seventy thousand dollars ($670,000.00) to Lloyd's for losses caused by the cancellation. Simultaneously, DKP submitted supporting documents, including the contract requiring DKP to pay Mr. Chavez for certain non-refundable training expenses. In the indictment, the government alleged that this conduct was an attempt to defraud the insurance company in violation of the wire-fraud statute, 18 U.S.C. § 1343.

The government alleged, among other things, that part of DKP's claim purporting to guarantee Mr. Chavez three hundred fifty thousand dollars ($350,000.00) for training expenses was added to the contract only after Mr. Chavez was injured, that Mr. King never paid this money to Mr. Chavez, and that the money was in the nature of a refundable loan and not recoverable under the insurance policy, even if the money was paid.

In 1994, after two years of grand-jury investigation into Mr. King's business practices, an indictment was returned that named Mr. King as the only defendant in connection with the Lloyd's insurance claim. Although DKP's employees were interviewed prior to the original indictment, and in fact, were given prosecutorial immunity, the prosecution chose not to indict DKP. Rather, the government focused its considerable power and

resources solely upon Mr. King.

On October 10, 1995, the first trial began. The prosecution presented nineteen (19) witnesses and introduced over three hundred (300) documents over a number of weeks. Ultimately, the jury informed the District Court that it was irretrievably deadlocked, and Mr. King exercised his right to seek a mistrial. At the time, the prosecution vehemently opposed the request for a mistrial.

In addition to the jury's inability to reach a decision, there was a concern that one of the jurors would have to leave for a prearranged overseas trip. The prosecution urged the court to give an Allen charge or to proceed with an eleven (11) person jury in the absence of this juror. The prosecution, after weeks of trial, did not relish losing the opportunity to convict Mr. King. However, the District Court indicated that it was inclined to grant the mistrial.

The prosecution's response to the Court's inclination was swift and sure. The prosecution requested that the District Court stay its Order to allow it to seek a writ of mandamus from the Second Circuit. With a temporary stay in place, the prosecutors, together with other senior members of the United States Attorney's Office, sought immediate review of the District Court's Order by Circuit Judge J. Daniel Mahoney. The District Court complied when it was asked to hold the jury until a three-judge panel of the United States Court of Appeals for the Second Circuit could hear the request for a writ of mandamus the following morning.

After working well into the night, the prosecution

eventually abandoned its effort to obtain a writ of mandamus because it could not meet the requisite legal standard. In a letter sent to Mr. King's lawyers by facsimile late that night, the prosecution conceded that it had no legal basis to pursue mandamus. In no uncertain terms, however, the prosecution loudly complained that it believed that the District Court had abused its discretion in granting the mistrial.

The following morning, the District Court implemented its ruling of the previous day and discharged the jury. Immediately thereafter, the U.S. Attorney called a press conference announcing her intention to retry Mr. King.

True to its word, the prosecution filed a superseding indictment on March 24, 1997. The allegations were unchanged. The indictment differed in only one respect: It added DKP as a defendant.

C. The Proceedings Below

DKP moved to exclude the testimony, including Mr. King's, given at Mr. King's first trial on the original indictment. DKP explained that, since it was not a defendant in the first trial, it had not had an opportunity to confront and cross-examine these witnesses as the Sixth Amendment guarantees.

The District Court granted the motion. After noting the applicability of the Confrontation Clause, the District Court correctly stated that "[c]orporations as well as individuals have been found to possess constitutional protections afforded to the accused by the Constitution." App. B. The District Court commented that "to

completely disregard the Confrontation Clause in this case merely because King owns all of the stock of DKP would be . . . an unacceptable extreme position." Id.

The District Court held that Mr. King's testimony was not admissible against DKP under Federal Rule of Evidence 801(d)(2)(D) because "that rule does not represent a 'firmly rooted' exception to the hearsay rule, and the government has not shown that King's testimony is accompanied by 'particularized guarantees of trustworthiness[1]'." Id.

The government appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals disagreed with the District Court's "thoughtful opinion," and reversed and remanded. App. A. In a disturbing decision, the Court of Appeals held:

1. That Mr. King individually was represented by counsel and that DKP had "no valid complaint that it lacked the opportunity to conduct its own cross-examination of the witness" because any "explanation or clarification" of the testimony that DKP might find

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[1] The District Court also held that Mr. King's testimony was not admissible against DKP under Federal Rules of Evidence 803(3), 803(24), 803(b)(3) or 804(b)(5). Id. Moreover, the District Court stated that it would exclude certain testimony of Mr. King from the first trial under Federal Rule of Evidence 403 because, "[i]f it were admissible . . . as far as can be seen without context in a second trial, its probative value is substantially outweighed by the danger of misleading the jury, for the reasons set forth above: lack of personal knowledge of the facts to which the statement relates, the possibility that King may not have thought the statement to be against his interest, ambiguity, and the exculpatory and therefore unreliable nature of the statement." Id.

necessary could have been accomplished by Mr. King's personal counsel. App. A.

2. That, in its view, a particular part of Mr. King's testimony as a matter of fact was intended by Mr. King to "adjust his testimony in the hope of shifting blame from himself to his wholly owned company" and that the Confrontation Clause should not be construed to aid a sole owner in doing so. App. A.

3. That "neither [King] nor his corporation can expect the rules of evidence to protect them" from what the Court of Appeals found to be a "tactical decision" to shift blame. App. A.

4. That Bruton v. United States, 391 U.S. 123 (1968), is "inapplicable where the co-defendant is accusing itself, albeit in its corporate, rather than its individual, capacity." App. A. The Court of Appeals also held that the Confrontation Clause was inapplicable "in this case," and "that a Confrontation Clause objection is not available where a corporation, owned entirely by one individual, seeks to preclude the use against it of that individual's testimony from a prior trial." Id.

The Second Circuit concluded that "[f]or purposes of the Confrontation Clause, the corporation is the alter ego of its sole shareholder and has no valid complaint that it lacked the opportunity to conduct its own cross-examination of the witnesses with respect to testimony that was subject to explanation or clarification by the shareholder-witness upon questioning by his counsel at the first trial." Id.

The Second Circuit, seemingly undisturbed,

recognized that its decision would mean that corporations would not "enjoy a Confrontation Clause right against the prior trial testimony of a sole shareholder." Id. Moreover, the Second Circuit brushed aside the District Court's concerns about reliability, stating that the Confrontation Clause is not "properly understood" to guard against the "sort of reliability" wherein "a sole shareholder, testifying in his defense at his own criminal trial, might unreliably seek to shift blame from himself to his corporation in an effort to avoid the risk of imprisonment." Id.

In addition, the Court of Appeals held that Mr. King's testimony in the first trial would be admissible against DKP in the second trial under Federal Rule of Evidence 801(d)(2)(D).[2]

Mr. King's for rehearing *en banc* was denied by the Second Circuit.

REASONS FOR GRANTING THE PETITION

In an admitted issue of first impression, App. A., the Second Circuit has issued an opinion with explosive implications for a defendant's right to undivided loyalty of counsel and counsel's ethical obligations to provide such representation.

Moreover, the Second Circuit has sustained the government's position to allow an unprecedented denial of the right of confrontation and cross-examination. Though

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[2] Last, the Court of Appeals held that the District Court's Rule 403 ruling "should be reconsidered on remand, now that the Confrontation Clause objection has been removed." App. A.

it appears that such a right of confrontation and cross-examination has never before been denied to any corporate defendant in this country's history in this context, the Court of Appeals nevertheless held that this particular corporation, DKP, should serve as the first step on a journey that can only lead to one destination: A country where constitutional rights of corporate defendants are either completely erased or corporate defendants are indicted, prosecuted and, perhaps, punished as first-class citizens, but treated for constitutional purposes as second-class citizens.

As reflected by the very opposite views that the District Court and the Court of Appeals took regarding this case, automatic deprivation of the right of confrontation and cross-examination raises serious questions about the Confrontation Clause and this Court's precedents regarding it.

The importance of the Second Circuit's decision cannot be overstated. The decision completely eliminates the Confrontation Clause from the Constitution for many corporate defendants throughout this country; it is contrary to the important and crucial goal of reliability in criminal trials; and it is the first step toward diminution or elimination of constitutional rights of corporate defendants.

That the Second's Circuit's opinion apparently represents the first occasion on which any federal court has erased the guarantees of the Confrontation Clause from the Constitution for a corporate defendant in this context, is not a reason to postpone this Court's review. The legal question presented is clear cut and unlikely to be enlightened by additional appellate treatment. Confrontation and cross-examination are bedrock,

foundational principles upon which the entire criminal-justice system are built. If they are eroded, the entire system begins to slide toward an inevitable collapse.

For similar reasons, the interlocutory nature of this appeal should not serve to delay this Court's review. Corporations and their counsel need clear guidance on the important constitutional matters presented here. The Confrontation Clause issue in this case will undoubtedly recur. When one considers the number of corporations throughout this country that do business in New York and the other jurisdictions within the Second Circuit, and the influence that decisions of the Second Circuit have throughout the country, the gravity and the danger of the Court of Appeals's decision becomes even more apparent.

For all of these reasons, the Supreme Court should grant this petition for a writ of certiorari.

I. THIS CASE RAISES AN IMPORTANT ISSUE REGARDING WHETHER THE CONFRONTATION CLAUSE BARS THE USE DURING A SECOND TRIAL OF STATEMENT OF A CORPORATION'S SOLE SHAREHOLDER, MADE AT THAT INDIVIDUAL'S FIRST TRIAL, TO PROTECT A CORPORATION THAT WAS NOT A DEFENDANT IN THE FIRST TRIAL AND, WHICH DID NOT HAVE AN OPPORTUNITY TO CONFRONT THE INDIVIDUAL, TO CROSS-EXAMINE HIM, OR TO TEST THE RELIABILITY OF THE STATEMENTS IN ACCORDANCE WITH THE GUARANTEES OF THE SIXTH AMENDMENT

A. The Second Circuit's Decision is an Unprecedented and Erroneous Analysis of the Confrontation Clause Clause as Applied to Corporate Defendants

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." United States Constitution, Amendment VI. Implicit in the Confrontation Clause is the right to cross-examine witnesses. Smith v. Illinois, 390 U.S. 129, 131 (1968)("It cannot be seriously doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him . . . .").

Cross-examination is an essential and fundamental requirement of a fair trial and serves to promote the reliability of statements or testimony in criminal trials, as well as pubic confidence in the criminal-justice system. Lee v. Illinois, 476 U.S. 530 (1985); Pointer v. Texas, 380 U.S. 400 (1965). A corporate defendant has the same right to cross-examination under the Confrontation Clause as does an individual defendant. United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Rad-O-Lite, 612 F.2d 740 (3rd Cir. 1979).[3]

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[3] Corporations, as well as individuals, have been found to possess constitutional protections afforded to the accused by the Constitution. For example, in United States v. Martin Linen Supply, 430 U.S. 564, 568-76 (1977), this Court applied the Fifth Amendment's Double Jeopardy Clause to affirm the dismissal of criminal contempt charges brought against corporations. See also Metropolitan Life Insurance v. Ward, 470 U.S. 869 (1985)(corporation entitled to equal protection); Helicopteros

It is well-settled that "[t]he Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." Idaho v. Wright, 497 U.S. 805, 814 (1990) (citations omitted).

Here, although acknowledging that "[t]he fact that an agent's actions may be binding upon his corporate employer does not necessarily mean that the corporation has no Confrontation Clause objection to the agent's testimony given at a prior trial," the Second Circuit nevertheless concluded that the Confrontation Clause is inapplicable in this case because the Confrontation Clause does not apply to protect a corporation, wholly owned by one individual, from admission of statements of the corporation's sole shareholder, made at that individual's prior trial. App. A. The Second Circuit's conclusion is built upon two slender reeds of analysis: (1) "For purposes of the Confrontation Clause, the corporation is the alter ego of its sole shareholder and has no valid complaint that it lacked the opportunity to conduct its own cross-examination of the witness with respect to testimony that was subject to explanation or clarification by the shareholder-witness upon questioning by his counsel at the first trial;" and (2) the Confrontation Clause does not "guard against [the] sort of unreliability" such as a "sole

Nacionales de Columbia v. Hall, 466 U.S. 408 (1984)(corporation entitled to due process); Penn. Central Transportation Co. v. New York City, 438 U.S. 104 (1978)(corporation cannot have property taken without just compensation); Marshall v. Barlow's Inc., 436 U.S. 307 (1978)(corporation is protected from unreasonable searches and seizures); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)(corporation has First Amendment right to freedom of speech).

shareholder, testifying in his defense at his own criminal trial, might unreliably seek to shift blame from himself to his corporation in an effort to avoid the risk of imprisonment." App. A. These legal conclusions on this important issue of constitutional law regarding the Confrontation Clause are incorrect for a number of separate and distinct reasons.

First, Mr. King and DKP are not alter egos for purposes of the Confrontation Clause. The obvious conflict between Mr. King and DKP can be summarized thus: If convicted, Mr. King can be deprived of his liberty and DKP cannot.

The Second Circuit's factual finding that DKP is Mr. King's "alter ego" for purposes of the Confrontation Clause admittedly is unprecedented. That finding overlooks and ignores that, even in a civil context, where forfeiture of constitutional rights and the collateral consequences of criminal conviction are not considerations, courts do not disregard the separateness of a corporation and its 100% shareholder absent strong proof that the corporate form was pretextual. The Second Circuit's opinion provides no basis for its "alter ego" conclusion other than Mr. King's ownership of 100% of DKP's stock.

Nor does equity support the Second Circuit's finding. The opposite conclusion is actually the case. The serious questions involved here arose only because the prosecution chose, for its own reasons, to indict Mr. King alone in 1994 even though a conviction of Mr. King would have supported a conviction of DKP under principles of derivative liability. DKP was not a defendant at Mr. King's first trial and, therefore, had no opportunity to

protect its separate interests in avoiding a conviction based on conduct other than Mr. King's. The Second Circuit's opinion allows the prosecution to profit from its recent and new strategic decision to add DKP as a defendant by depriving DKP of cross-examination rights it clearly would have had if the prosecution had done in 1994 what it chose to do in 1997. This is both unconstitutional and unfair.

Second, the Second Circuit's determination that DKP's confrontation rights were in fact and as a matter of law protected because Mr. King's personal counsel was present at the first trial and could have represented DKP's interests at the first trial also is unprecedented. It overlooks and ignores fundamental concepts regarding the rights of an accused to counsel and the obligations of counsel to the accused. The Sixth Amendment guarantees a criminal defendant representation by counsel of undivided loyalty whose judgment is uninfluenced by the concerns of others to whom he owes no allegiance. The Canons of Professional Responsibility obligate counsel to provide precisely such independent judgment, advice and assistance. The Second Circuit's finding that Mr. King's counsel was obliged to consider and seek to protect the interests of DKP is in fundamental derogation of these constitutional rights and ethical obligations.

Counsel for Mr. King was professionally obliged to represent Mr. King's interests only and to exercise his judgment accordingly. Indeed, any consideration of DKP's interests, as opposed to Mr. King's, would have been an egregious breach of the most basic of counsel's responsibilities. The Canons of Professional Responsibility require that "[t]he professional judgment of a lawyer should be exercised, within the bounds of law,

solely for the benefit of his client and free of compromising influences and loyalties." American Bar Association Model Code of Professional Responsibility, Canon 5, Ethical Consideration 5-1.

The Sixth Amendment guarantees an accused precisely this undivided loyalty and uncompromised representation. In Glasser v. United States, 315 U.S. 60 (1942), the state court-appointed attorney for one of the defendants in a conspiracy case to represent another of the defendants as well. This Court reversed the conviction of the first defendant. This Court stated that:

> The "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

Id. at 70. After an exhaustive review of the record, and particularly those decisions of defense counsel not to examine particular witnesses and not to object to certain questions because of fear that such actions would be to the detriment of one of his clients while perhaps benefiting the other, the Court noted defense counsel's "struggle to serve two masters," and held:

> Our examination of the record leads to the conclusion that Stewart's representation of Glasser [his original client] was not as effective as it might have been if the

> appointment [to represent Kretske] had not been made.

Id. at 75-76. See Von Moltke v. Gillies, 322 U.S. 708, 725-26 (1948)("The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision."); United States v. Curcio, 680 F.2d 881, 884-85 (2d Cir. 1982)(the Sixth Amendment right to effective assistance of counsel includes "representation by an attorney of undivided loyalty" and "a criminal defendant has an absolute right under the Sixth Amendment to be represented by an attorney who has no conflict of interest.").

Here, in an opinion that flatly ignores these fundamental principles, the Court of Appeals found that Mr. King's individual counsel, representing Mr. King alone, had an obligation to consider and protect the interests of an unindicted party, DKP, to which he owed no allegiance. The Court of Appeals went further than this. It concluded that DKP, in a subsequent trial, has no confrontation rights *vis-a-vis* Mr. King's prior testimony because it actually was represented by Mr. King's individual counsel. The Court of Appeals' arguments run directly contrary to the requirements of the Constitution and the ethical Canons. Mr. King was entitled to undivided loyalty and uninfluenced judgment. Mr. King's counsel was required to give him such loyalty and judgment. DKP's distinct interests could be of no moment. And, of course, DKP, had it been named as a defendant, would have had the same Sixth Amendment

rights which the Court of Appeals held was forfeited now that the prosecution added it as a defendant on "strategy" grounds.[4]

Clearly, Mr. King's counsel could not serve two masters. Mr. King was his client, not DKP. Indeed, by reason of prosecutorial strategy, DKP was not a party and not even under indictment. Had DKP been a defendant, it would have had a constitutional right to its own counsel, who would have had the right and obligation to pursue DKP's separate interests in avoiding conviction, including examination of Mr. King. The Second Circuit ignored all of this. In essence, the Second Circuit's holding is that the mere presence of counsel for Mr. King satisfied

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[4] The prosecution's argument that DKP's interests are distinct are not credible. Following the dismissal of DKP and prior to the reversal of that dismissal, William H. Murphy, Jr., Esquire, who had been counsel for DKP, assisted in the representation of Mr. King. By letter dated September 15, 1997, the prosecution sought a Curcio hearing because "Mr. Murphy represents and continues to represent DKP, Inc., and is presumed to have loyalties to that party. Thus, Mr. Murphy might potentially give Mr. King legal advice beneficial to the corporation but detrimental to Mr. King." (See Government's September 15, 1997, letter to Hon. Lawrence M. McKenna). Following the reversal of Judge McKenna's vindictive prosecution dismissal of DKP, the government advised the District Court that a Curcio hearing was required to forestall any claim by DKP of "ineffective assistance" of counsel by reason of Mr. Murphy's representation of Mr. King. (See Transcript of Proceedings, December 16, 1997, at 36). The prosecution's position in each instance reflected a clear understanding of the distinct interests of Mr. King and DKP and the loyalties of counsel requiring consideration of only those interests.

DKP's constitutionally guaranteed confrontation rights.[5]

Moreover, DKP was not a party to the first trial; accordingly, it was not present and obviously had no lawyer present to conduct cross-examination of Mr. King with respect to his vague and ambiguous testimony.[6] Mr. King's attorney at the first trial had no motive to explore testimony that the government elicited that was not harmful to Mr. King personally. Simply stated, the opportunity to Mr. King's counsel to question Mr. King at

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[5] The implications of the "alter ego" finding are substantial. For example, would a court uphold the dismissal of an indictment against DKP on double jeopardy grounds if Mr. King had been acquitted at the first trial on the basis that DKP is Mr. King's "alter ego," a proposition the prosecution surely would contest.

[6] In fact, the questions were asked during the government's cross-examination of Mr. King were hypothetical in nature, and Mr. King's answers were dangerously vague and ambiguous. The government itself has called Mr. King's testimony "a complete fabrication," Tr.29.2647, falsely exculpatory, Government Brief, fn.* at 36, and falsely exculpatory in a manner exculpatory of DKP. Id. at 37.

Moreover, in this case, Mr. King's testimony was so ambiguous, vague and confusing that a jury will be forced to arbitrarily decide what Mr. King meant in response to the words "wrong" and "deceptive" in the context of the government's cross-examination and the first trial.

Many courts, including this Court, have observed that a defendant's exculpatory testimony that inculpates an absent codefendant is anything but reliable. See, e.g., Lee v. Illinois, 476 U.S. 530, 541 (1986)("[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination."); United States v. Matthews, 20 F.3d 538 (2d Cir. 1994).

the first trial cannot cure the inability of DKP's counsel to cross-examine Mr. King at the second trial. This is particularly so in this case because the government voluntarily chose not to make DKP a defendant in the first trial, although it had ample opportunity to do so.

Third, in contrast, it is self-evident that, because the words of the prior testimony, depending upon the meaning and context chosen by the government and accepted by the jury, could be extremely, unfairly and unintentionally damaging to DKP, the corporation (DKP) has a vital interest in confronting Mr. King and cross-examining him to establish that these words had a meaning to him that, in proper context, would not inculpate DKP.[7]

In this regard, it is disturbing that the Second Circuit rejected (by not even addressing) the findings of Judge McKenna, who witnessed Mr. King's testimony and was in a position to judge its meaning in the context of the trial as a whole. The Second Circuit found as a fact that Mr. King "adjust[ed] his testimony in the hope of shifting blame from himself to his wholly owned company," and that, given this finding, DKP could not "complain that it lacked an opportunity to cross-examine itself." App. A. On this basis it denied DKP's cross-examination rights, holding: "The [Confrontation] Clause should not be construed to aid the sole owner of a corporation to adjust his testimony in the hope of shifting blame from himself to his wholly owned company." App. A.

The Second Circuit apparently concluded that Mr.

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[7] Quick reference to almost any dictionary establishes that the word "wrong" and the word "deceptive" are inherently ambiguous in common usage unless defined precisely by the user and the context.

King and his counsel deliberately devised a defense that would shield Mr. King from conviction at the expense of DKP. This finding is without basis. On direct examination, Mr. King blamed no one. The testimony upon which the Court of Appeals relied was elicited by the prosecution at the tail end of a lengthy cross-examination, and was never suggested as part of Mr. King's defense. In its misinterpretation of the record and its conclusion that Mr. King was the affirmative proponent of the testimony at issue, the Court of Appeals also ignored the District Court's specific finding that the testimony was ambiguous and susceptible of an interpretation having nothing to do with criminal conduct by anyone. App. A.

In this latter regard, Judge McKenna, who presided over the trial and, therefore, was in the best position to assess all of the evidence in context as well as witness demeanor, rejected any notion of an exculpatory "adjustment" and in his decision on prosecutorial vindictiveness found as a fact that Mr. King's position throughout never changed: "His strategy throughout was the hardly surprising position that the government had not proved the charges contained in the original indictment." United States v. King, 1997 WL 527867 at *9. Those charges, of course, were personal to Mr. King. Rejecting the prosecution's claim of blame shifting, Judge McKenna also specifically found that Mr. King never "argued that there was a crime." Id. In his recent decision, Judge McKenna was more explicit, finding, as is clearly the case, that Mr. King's "answers to the third and fourth of the questions put to him are, however, ambiguous" because, while "susceptible" of the meaning the prosecution argued, the answers were unexamined and unexplained and could reasonably be interpreted in a manner having nothing to do with the falsity of the rider

itself or criminal conduct by anyone. United States v. King, 1997 WL 666878 at *9.

Judge McKenna's factual findings were entitled to great weight, and subject to review only for clear error. United States v. Ramirez, 91 F.3d 1297, 1299 (9th Cir. 1996)(appeal under 18 U.S.C. section 3731); United States v. Hamilton, 46 F.3d 271, 273 (3d Cir. 1995)(same); see United States v. Underwood, 932 F.2d 1049, 1052 (2d Cir. 1991)(motion for new trial on grounds of newly discovered evidence). The Court of Appeals, instead, substituted its own determination that Mr. King's testimony constituted "tactical" "blame-shifting" and, without basis, rejected other reasonable interpretations of Mr. King's testimony that have nothing to do with and do not support a finding of criminal conduct by anyone.

DKP cannot be deprived of its right to confront Mr. King in order to determine how Mr. King understood the questions posed and what he meant when he gave affirmative responses. By prosecutorial choice, DKP was not a party at the first trial. Now that the prosecution has "strategized" DKP into the case, DKP's clear interest to clarify the ambiguous testimony cannot be forfeited.

Fourth, the Second Circuit and the government cannot have it both ways. They cannot treat Mr. King and DKP as if they are subject being indicted separately, convicted separately and sentenced separately, yet insist that they are "alter egos" for purposes of guaranteed constitutional protections. In this context, stripping DKP of its right to confront and cross-examine Mr. King is not only a violation of the Confrontation Clause, it is tantamount to depriving DKP of its constitutional right to a fair trial.

In sum, by mechanically applying the undefined and unconstitutional term "alter ego," the Second Circuit has gutted the Constitution and eliminated the Confrontation Clause for corporate defendants such as DKP.

As for Second Circuit's conclusion that its decision is not counter to the public goal of reliability underlying the Confrontation Clause, there is a fifth reason why the Court of Appeals' decision is erroneous and dangerous. What can more undermine public confidence in the criminal-justice system than the deprivation of any criminal defendant's right to confront and cross-examine its accuser? Testimony without confrontation and cross-examination is not a truth-seeking function -- it is a deck-stacking function that ultimately will lead to the destruction of public confidence regarding this country's system of justice. In sum, "[i]n federal criminal cases the defendant against whom the testimony is now offered must have been a party in the prior proceeding. . . . Another party, no matter how closely allied in interest or motive, will not do." 5 Jack B. Weinstein and Margaret A. Berger, Weinstein's Federal Evidence § 804.04[6], at 804-41 (rev. 2d ed. 1997)(footnote omitted).

The Second Circuit's sudden and unprecedented elimination of the Confrontation Clause requires this Court's immediate attention. The Confrontation Clause, no less than any other constitutional guarantee, cannot be eliminated by judicial decree.

B. The Second Circuit's Decision is Unprecedented and Erroneous Regarding its Analysis of Federal

Rule of Evidence 801(d)(2)(D)

Federal Rule of Evidence 801(d)(2)(D) states that a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, [and] made during the existence of the relationship . . . ."

However, extrajudicial testimony such as Mr. King's may not be admitted contrary to the Confrontation Clause (without an opportunity to confront and to cross-examine), under Federal Rule of Evidence 801(d)(2)(D) unless that rule falls within a firmly rooted exception to the hearsay rule. Otherwise, the evidence must be excluded, absent a showing of particularized guarantees of trustworthiness. As this Court stated in Ohio v. Roberts, 448 U.S. 56 (1980):

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more of a case where the exception falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of "particularized guarantees of trustworthiness."

Id. at 66 (footnote omitted). See also Idaho v. Wright, 497 U.S. at 814-15; Bourjaily v. United States, 483 U.S. 171, 182-83 (1987); Lee v. Illinois, 476 U.S. 530, 543

(1986)[8].

The Second Circuit indicated that the "same considerations that render the Confrontation Clause inapplicable also refute DKP's contentions that [Mr.] King's testimony is not admissible against his corporation under Rule 801(d)(2)(D)." App. A. This conclusion, also, is erroneous for a number of reasons.

First, Federal Rule of Evidence 801(d)(2)(D) does not represent a firmly rooted exception to the hearsay rule. As the District Court properly noted, "The drafters of the Federal Rules of Evidence, which became effective in 1975, did more in Fed. R. Evid. 801(d)(2)(D) than recategorize an exception to the hearsay rule as 'not hearsay,' id., 801(d)(2), as the Advisory Committee Notes to the proposed rules make clear. The new Federal Rules of Evidence broadened the exception as well." App. B. In sum, with respect to Federal Rule of Evidence 801(d)(2)(D), the new rule abandoned the traditional test of admissibility of statements by agents and made a clean

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[8] The District Court and the Court of Appeals agreed that statements within Federal Rule of Evidence 801(d)(2)(D) are defined as "not hearsay," id. 801(d), rather than as within an exception to the hearsay rule. However, that is not relevant to Confrontation Clause analysis. In Bourjaily, this Court applied the Confrontation Clause analysis of Ohio v. Roberts to evidence admitted under Federal Rule of Evidence 801(d)(2)(E), also defined by the Federal Rules of Evidence as "not hearsay." See Bourjaily, 483 U.S. at 181-84. In this context, this Court has looked to the traditional definition of hearsay as "'testimony in court, or written evidence, of a statement made out of court, the statement being offered as a assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'" Lee, 476 U.S. at 543 n.4 (*quoting* E. Clearly, McCormick on Evidence, § 246, at 584 (2d ed. 1972).

break from the firm roots of the common law. See The Advisory Committee Notes with respect to Federal Rule of Evidence 801(d)(2)(D), reprinted in Weinstein, § 801 App. 01[2], at 801 App.-7; 5 Weinstein, § 801.23[1], at 801-53; see also United States v. Portsmouth Paving Corp., 694 F.2d 312, 321 (4th Cir. 1982); 31 Michael H. Graham, Federal Practice and Procedure: Evidence, § 6273, at 179 (interim ed. 1997).

Second, the District Court -- which was in the best position to know -- indicated that Mr. "King's testimony at his first trial, given in defense of charges against himself, personally, cannot be considered to have been made within the scope of his employment by DKP, or to have been authorized by DKP." App. B. Mr. King was acting solely in his interest when he testified during the 1995 trial. Mr. King, in the face of serious personal criminal charges, obviously did not testify on behalf of DKP, which the government chose not to indict. Mr. King's relationship with DKP clearly did not cover Mr. King's act of taking the witness stand in 1995; DKP could not require Mr. King to testify and it could not derive any benefit from his personal decision to do so. Restatement (Second) of Agency § 235, at 520 (1957)("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed."). Accordingly, the District Court was correct that the testimony of Mr. King in the first trial should not be admitted against DKP under the "firmly rooted" hearsay exception theory.

Third, Mr. King's testimony, as the District Court again properly found, was not accompanied by particularized guarantees of trustworthiness. App. B. As

remarkable as it sounds, in the courts below, both the government and DKP agreed that Mr. King's testimony from the first trial was unreliable and untrustworthy. Moreover, as far as the records reveals, the government has never claimed that Mr. King's testimony, taken as a whole, is reliable: Indeed, in its closing arguments at the first trial, the government repeatedly suggested that Mr. King testified untruthfully. App. B.

Particularly instructive here is this Court's decision in Lee v. Illinois, 476 U.S. 530 (1986). In Lee, this Court stated that its holding in Douglas v. Alabama, 380 U.S. 415 (1965), "was premised on the basic understanding that when one person accuses another of a crime in circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U.S. at 541.

While the presumption acknowledged in Lee v. Illinois can be rebutted, 476 U.S. at 543, the government did not do so in the courts below; it did not even attempt to do so. App. B. Accordingly, Mr. King's testimony, without cross-examination by DKP, must be presumed to be unreliable and lacking in the particularized guarantees of trustworthiness that this Court mentions in Ohio v. Roberts, 448 U.S. at 66, and in Idaho v. Wright, 497 U.S. at 820-21 ("We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from the totality of circumstances that surround that making of the statement and that render the declarant particularly worthy of belief." Evidence admitted as possessing "particularized guarantees of trustworthiness . . . must be trustworthy that adversarial testing would add little to its

reliability.").

Here, in the courts below, the government did not argue, however, that Mr. King's testimony would be accompanied by "particularized guarantees of trustworthiness," Ohio v. Roberts, 448 U.S. at 66, or that the "totality of the circumstances . . . [would] render [King] particularly worthy of belief," Idaho v. Wright, 497 U.S. at 820, or that Mr. King's testimony would be "so trustworthy that adversarial testing would add little to its reliability." Id. at 821.

Instead, the government asserted that admissions within Federal Rule of Evidence 801(d)(2)(D) are not subject to a trustworthiness requirement and cited the Advisory Committee Notes to the proposed rule and United States v. Goins, 11 F.3d 441, 443-44 (4th Cir. 1993), cert. denied, 511 U.S. 1110 (1994).

As the foregoing demonstrates, the Second Circuit's unprecedented analysis of the relationship among the Confrontation Clause, Federal Rule of Evidence 801(d)(2)(D), and the particularized guarantees of trustworthiness that this Court mentions in Ohio v. Roberts, 448 U.S. at 66, and in Idaho v. Wright, 497 U.S. at 820-21, requires this Court's immediate attention.

CONCLUSION

For all of the foregoing reasons, petitioner, Don King Productions, Inc., respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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June 2, 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

Argued: December 1, 1997 Decided: January 26, 1998

Docket No. 97-1615

UNITED STATES OF AMERICA,

Appellant,

v.

DON KING and DON KING PRODUCTIONS, INC.,

Defendants-Appellees.

Before: WINTER, *Chief Judge*, FEINBERG and NEWMAN, *Circuit Judges*.

Interlocutory appeal from the October 22, 1997, order of the United States District Court for the Southern District of New York (Lawrence M. McKenna, Judge) excluding certain evidence from the impending criminal trial of defendants-appellees.

Reversed and remanded for further proceedings.

Baruch Weiss, Asst. U.S. Atty., New York, N.Y. (Mary Jo White, U.S. Atty., Laura Grossfield Birger, Christine H. Chung, Asst. U.S. Attys., New York, N.Y., on the brief), for appellant.

Peter E. Fleming, Jr., New York, N.Y. (Bernard V. Preziosi, Jr., Michael Quinn, Curtis Mallet-Prevost, New York, N.Y., on the brief), for defendant-appellee Don King.

William H. Murphy, Jr., Baltimore, Md. (Anthony B. Covington, Deborah Liu, William H. Murphy, Jr. & Associates, Baltimore, Md. on the brief), for defendant-appellee Don King Productions, Inc.

JON O. NEWMAN, *Circuit Judge*:

This interlocutory criminal appeal, pursuant to 18 U.S.C. § 3731, primarily concerns a Confrontation Clause issue arising in the context of a closely held corporation. The specific issue is whether the Confrontation Clause bars the Government from offering in evidence against a corporation testimony of the corporation's president and sole shareholder, given at a prior criminal trial at which the corporate officer, but not his corporation, was a defendant. The United States brings this pretrial appeal from the October 22, 1997, order of the District Court for the Southern District of New York (Lawrence McKenna, Judge), excluding the trial testimony of boxing promoter Don King from a forthcoming trial at which both King and his corporation, Don King Productions, Inc. ("DKP"), will be defendants. We conclude that the Confrontation Clause is inapplicable in this case, and therefore reverse and remand.

Background

King was the sole defendant on an indictment charging him with wire fraud offenses arising out of an alleged scheme to defraud an insurance company. After the jury deadlocked in that trial, a mistrial was declared. The Government then sought and obtained a new indictment charging both King and DKP with the wire fraud offenses. Inclusion of DKP in the new indictment was initially precluded by the District Court on the ground of prosecutorial vindictiveness. *See United States v. King*, No. 94-Cr. 455, 1997 WL 527867 (S.D.N.Y. Aug. 22, 1997). On the Government's prior interlocutory

appeal, we reversed. *See United States v. King*. 126 F.3d 394 (2d Cir. 1997).

Upon remand, the District Court considered previously filed motions by the defendants to bar use of King's testimony from the first trial in the Government's direct case at the second trial. Judge McKenna granted the defendant's motions in a thoughtful opinion. *See United States v. King*, No. 94 Cr. 455, 1997 WL 666778 (S.D.N.Y. Oct. 24, 1997). Considering first the admissibility of King's testimony against DKP, he ruled that the testimony appeared to come within Rule 801(d)(2)(D) of the Federal Rules of Evidence, which specifies that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." However, he further ruled that the Confrontation Clause applied to King's testimony from the first trial since DKP had not been a defendant at that trial and therefore had lacked an opportunity to cross-examine King. Finally, he concluded that the Confrontation Clause precluded King's testimony from use against DKP because section 801(d)(2)(D), in its

current form,[1] is not "a firmly rooted hearsay exception,"[2] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), nor was the testimony given under circumstances establishing "particularized guarantees of trustworthiness," *id.* (footnote omitted).

With respect to the admissibility of King's first trial testimony against King himself, Judge McKenna first ruled that the testimony would be admissible against King under Rule 801(d)(2)(A) (party's own statement not hearsay) if he were tried alone. However, he further ruled, admission of King's testimony at a joint trial of King and DKP would encounter problems under *Bruton v. United States*, 391 U.S. 123 (1968), at least to the extent that the testimony was exculpatory of King, inculpatory of DKP, and not susceptible to redaction. Since the Government was proposing to offer the entirety of King's prior testimony, Judge McKenna understandably felt unable to assess all *Bruton* issues that might arise at the second trial and therefore outlined a procedure for identifying specific *Bruton* issues. However,

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[1] Section 801(d)(2)(D) broadens the prior definition of admissible statements of agents from statements "made by the agent acting in the scope of his employment" to statements "related to a matter within the scope of the agency or employment." Fed. R. Evid. 801(d)(2)(D) advisory committee note. We need not decide whether this broadening renders the current version not "firmly rooted," *Ohio v. Roberts*. 448 U.S. 56, 66 (1980), as a hearsay exception, for purposes of the Confrontation Clause."

[2] Judge McKenna recognized, correctly in our view, that though Rule 801(d)(2)(D) categorizes statements within its terms as "not hearsay," the Supreme Court has applied the traditional hearsay definition, *see Lee v. Illinois*, 476 U.S. 530, 543 n.4 (1986), in determining whether a hearsay "exception" is "firmly rooted" for purposes of the Confrontation Clause. *See Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987) (statement excluded from hearsay definition by section 801(d)(2)E)).

he ruled that one portion of King's testimony — the four answers that appeared to shift responsibility to DKP[3] — would be excluded under *Bruton*.

Discussion

1. Admission of King's Testimony Against DKP

The principal question concerning the admission of King's testimony against DKP is whether the Confrontation Clause applies to protect a corporation, wholly owned by one individual, from admission of statements of the corporation's sole shareholder, made at that individual's prior trial. No prior decision appears to have considered this precise issue.

Somewhat relevant, and helpful to the Government, is Judge Friendly's observation in *United States v. Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir. 1985), that a Confrontation Clause objections to admission of notes prepared by a corporation's general counsel "seems hardly appropriate when voiced by [the corporation], since the witness it wishes to confront is, in the eyes of the law, itself." This observation does not settle the matter, however, for three reasons. First, the remark is dictum since the notes were not being used to prove a fact stated in them, and the Court ultimately assume, for the argument, that the Confrontation Clause applied. Second, the Court relied on *United States v. Dotterweich*, 320 U.S. 277, 281 (1943), which had said only that "from the point of view of action the individuals are the corporation." The fact that an agent's actions may be binding upon his corporate employer does not necessarily mean that the corporation has no Confrontation Clause objection to the agent's testimony given at prior trial. Third, the agent in

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[3] These answers are summarized in our prior opinion *See King*, 126 F.3d at 399 n.1.

Southland prepared the notes in the course of his duties as general counsel, whereas King's testimony was given in the course of his defense at his trial on criminal charges.

Nevertheless, we conclude that a Confrontation Clause objection is not available where a corporation, owned entirely by one individual, seeks to preclude the use against it of that individual's testimony from a prior trial. For purposes of the Confrontation Clause, the corporation is the alter ego of its sole shareholder and has no valid complaint that it lacked the opportunity to conduct its own cross-examination of the witness with respect to testimony that was subject to explanation or clarification by the shareholder-witness upon questioning by his counsel at the first trial.[4] We fully appreciate that state law recognizes the separateness of a wholly owned corporation from its sole shareholder for purposes of insulating the shareholder from liability for the corporation's debts, at least in the absence of circumstances warranting piercing the corporate veil. But the state law principle that insulates the shareholder from the debts of his corporation does not warrant insulating the corporation under the Confrontation Clause from the evidentiary use against it of the shareholder's statements, at least those given under oath in a proceeding in which the shareholder is represented by counsel. Corporate separateness need not be recognized for all purposes. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook R.Co.*, 417 U.S. 703, 713 (1974).

Judge McKenna advanced two reasons for according DKP the protection of the Confrontation Clause. First, he pointed

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[4] The four answers most particularly at issue on this appeal were elicited by the Government on cross-examination, but King's counsel was not denied the opportunity to examine with respect to these answers on redirect examination.

out that corporations enjoy constitutional rights. *See King*, 19997 WL 666778, at *3 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (double jeopardy protection), and *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989) (jury trial)). Second, he expressed concern that denying DKP Confrontation Clause protection would "counter the public goal of reliability underlying" the Clause. *See id.* We do not think either reason resolves the pending issue. The fact that corporations enjoy some constitutional rights does not necessarily mean that they enjoy a Confrontation Clause right against the prior trial testimony of a sole shareholder. As to reliability, we recognize that a sole shareholder, testifying in his defense at his own criminal trial, might unreliably seek to shift blame from himself to his corporation in an effort to avoid the risk of imprisonment. But we do not believe the Confrontation Clause is properly understood to guard against that sort of unreliability. The Clause should not be construed to aid the sole owner of a corporation to adjust his testimony in the hope of shifting blame from himself to his wholly owned company. If he unreliably endeavors to shift blame, the corporation that he wholly controls has no valid complaint.

The same considerations that render the Confrontation Clause inapplicable also refute DKP's contention that King's testimony is not admissible against his corporation under Rule 801 (d)(2)(D). DKP argues that though King is certainly an agent of DKP, his testimony is not admissible under Rule 801(d)(2)(D) because the interests of King and his corporation were in conflict to the extent that King is to be understood trying to exonerate himself at the expense of DKP. *See Securities and Exchange Commission v. Geon Industries, Inc.*, 531 F.2d 39, 43 n.3 (2d)Cir. 1976) (exclusion of agent's statement upheld in light of "conflicting litigating positions" between employee-agent and employer), *see also Brink's Inc.*

v. City of New York, 717 F.2d 700, 719 n.3 (2d Cir. 1983) (Winter, J., dissenting).

The adversity recognized in *Geon Industries* cannot be invoked by an entity that is the alter ego of the declarant. Just as DKP cannot validly complain that it lacked an opportunity to cross-examine itself, it similarly cannot complain that its sole shareholder, speaking in his individual capacity, might have unreliably sought to shift blame to himself in his corporate capacity. The construction of Rule 801(d)(2)(D) that protects a fully distinct entity from having attributed to it the statements of its agent under circumstance of "conflicting litigation positions," has no application to alter egos. To whatever extent King sought to shift blame to his wholly owned corporation, neither he nor his corporation can expect the rules of evidence to protect them from that tactical decision, whether the blame-shifting statement was truthful or not. King's testimony is admissible against DKP under Rule 801(d)(2)(D).

The only remaining issue concerning the admissibility of King's testimony against DKP is the possibility of exclusion under Rule 403. Judge McKenna indicated that, at least to the extent that the Government was offering against DKP portions of King's testimony as declarations against penal interest, *see* Fed. R. Evid. 804(b)(3), the portions would be inadmissible because the "probative value is substantially outweighed by the danger of misleading the jury." *See King*, 1997 WL 666778, at *10 (citing Fed. R. Evid. 403). To the extent that this aspect of his ruling was related to statements offered only under Rule 804(b)(3), it appears to have no bearing on testimony that we have ruled is admissible under Rule 801(d)(2)(D), in the absence of a Confrontation Clause objection. To whatever extent the Rule 403 ruling was intended to apply more broadly, it should be reconsidered on

remand, now that the Confrontation Clause objection has been removed. Since DKP, as King's alter ago, cannot validly complain that it lacked an opportunity to cross-examine itself, it similarly has little, if any, basis for complaint that testimony, admissible against King, would be excludable against the corporation by virtue of Rule 403. Moreover, Judge McKenna explicitly supported his Rule 403 ruling with considerations that are inapplicable to DKP, once it is regarded as the alter ago of King. For example, he relied in part of DKP's lack of personal knowledge of King's statements, but an alter ego cannot validly make that complaint. How Rule 403 would apply in the precise circumstances of the second trial, however, is a matter for the District Judge to consider on remand, perhaps most appropriately as such issues arise in the course of the trial.

2. Admission of King's Testimony against King

Though Judge McKenna ruled that King's testimony would be admissible against King, he concluded that its admission *at the forthcoming joint trial* would encounter *Bruton* objections, the precise resolution of which would depend on which portions of the prior testimony the Government offered. However, with respect to the four answers that appeared to shift responsibility to DKP, he ruled that *Bruton* would bar their use against the corporation.

For substantially the same reasons that King's testimony encounters no valid Confrontation Clause objection when offered against his corporation, it also encounters no valid *Bruton* objection. King and his wholly owned corporation are alter egos for both purposes. *Bruton* serves to protect a defendant from prior accusations by a currently tried co-defendant that the defendant had no opportunity to cross-examine. The rationale of that protection is inapplicable

where the co-defendant is accusing itself, albeit in its corporate, rather than its individual, capacity.

Conclusion

The order of the District Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Cr. 455 (LMM)

UNITED STATES OF AMERICA

- v -

DON KING and
DON KING PRODUCTIONS, INC.,

Defendants.

MEMORANDUM AND ORDER

[stamp—Copies Mailed to Counsel of Record OCT 22 1997]

McKENNA, D.J.

A.

Defendants move for dismissal of the aiding and abetting charges contained in the superseding indictment. The motion is denied.

The Court's statement regarding the evidence at the first trial (Tr. Nov. 8, 1995, at 2563-64) in connection with the Court's conditional (*id.*, at 2565) determination not to charge as to the elements of criminal liability under 28 U.S.C. § 2(a) (the Court did not include *id.* § 2(b) in its determination, *see* Tr. Nov. 8, 1995, at 2565-66) was not a determination under Fed. R. Crim. P. 29, as that at issue in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), was, *see id.* at 566, 571-72, but only an explanation of a determination relative to the charge.

Whether a charge under either subdivision of 18 U.S.C. § 2 will be appropriate at the second trial will depend, of course, on the evidence.

B.

1.

Defendants move for the exclusion of testimony — including that of King — given at King's first trial on the original indictment. Defendants argue that:

> Should DKP remain as a defendant and be prosecuted with King in a joint second trial, prior testimony from the various witnesses at King's first trial, all of which constitutes hearsay, cannot be received in evidence at the second trial. DKP has not had an opportunity to confront and cross-examine these witnesses as the Sixth Amendment guarantees.

(Def. Mem. at 2 (citing *Bruton v. United States*, 391 U.S. 123, 126 (1968), and Fed. R. Evid. 804(b)(1)).) That reasoning, defendants continue, applies to King's testimony, even though he is the sole owner and president of his co-defendant, Don King Productions, Inc. ("DKP"). "In federal criminal cases the defendant against whom the testimony is now offered must have been a party in the prior proceeding. Another party, no matter how closely allied in interest or motive, will not do." 5 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence* (hereinafter *"Weinstein"*) § 804.04[6] at 804-41 (rev. 2d ed. 1997) (footnote omitted) (quoted in Def. Mem. at 2).

Upon this Court's dismissal of the superseding indictment as to DKP on August 22, 1997, the present motion became moot until the Court, on October 3, 1997, determined that, in light of statements made in the Court of Appeals' opinion of October 1, 1997, reversing the dismissal as to DKP, a

joint trial of King and DKP was required. For purposes of the present motion, the Court assumes a joint trial (without prejudice to defendants' motion for reconsideration of this Court's denial of their motion for severance or their Petition for Rehearing with Suggestion for Rehearing En Banc, filed with the Court of Appeals on October 14, 1997).

Only the testimony of King is at issue. The government has not identified any other witness whose first trial testimony it seeks to introduce at the second trial except for Salter, Rawson, Hawkins and Collett, whose testimony at the first trial was given in the form of depositions taken under Fed. R. Crim. P. 15; the government's request to reuse those depositions at the second trial for the sake of convenience has been denied (Tr. June 13, 1997, at 79), and the witnesses have been deposed again for purposes of the second trial.

The government now seeks to introduce King's first trial testimony in its entirety at the second trial. (Gov't Letter to Court, Oct. 9, 1997, at 2.)[1]

The Court considers only the introduction of King's testimony as a part of the government's direct case, since possibly relevant developments after the direct case cannot now be foreseen.

The government argues that all of King's testimony is admissible against DKP under Fed. R. Evid. 801(d)(2)(D), 803(24) and 804(b)(5) (Gov't Mem. at 11-18), and that "certain portions" of it are admissible under Fed. R. Evid. 804(b)(3) (Def. Mem. at 18) and Fed. R. Evid. 803(3). (Gov't Letter to Court, June 10, 1997, at 3.) The only portion of King's testimony that the government has identified as admissible under the last two cited rules consists of

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[1] Previously, the government had sought to introduce only portions, not yet identified, of King's testimony. (Tr. June 13, 1997, at 2.)

King's answers to four hypothetical questions put to him on cross examination:

> Q. If this rider was added to the contract, that was done without your knowledge, correct?
>
> A. Yes.
>
> Q. And certainly without your approval, correct?
>
> A. Yes.
>
> Q. It would have been wrong to add that rider to the contract after Mr. Chavez was injured, correct?
>
> A. Yes.
>
> Q. It would have been deceptive to add that rider to the contract and to submit that contract to the insurance company; isn't that a fact?
>
> A. Yes.

(Tr. Nov. 6, 1995, at 2328.) In addition, the government argues that "portions" of King's testimony (which have not been identified), that it will seek to introduce to show that King lied, *i.e.*, as false exculpatory statements, are admissible because they will not be offered for their truth, and are thus not hearsay. *Cf.* Fed. R. Evid. 801(c). (Gov't Letter to Court, June 10, 1997, at 2.)

The government further argues that all of King's first trial testimony is admissible against King under Fed. R. Evid. 801(d)(2)(A). (Gov't Mem. at 11.)

The Court first addresses the admissibility of King's testimony at the first trial against DKP at the second trial.

2.

The admissibility of King's testimony at the first trial against DKP at the second cannot be resolved on the basis of

the Federal Rules of Evidence alone, because the Confrontation Clause also applies. "The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (citations omitted).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court set forth the rule that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66 (footnote omitted). *See also Idaho v. Wright*, 497 U.S. at 814-15; *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987); *Lee v. Illinois*, 476 U.S. 530, 543 (1986); *United States v. Matthews*, 20 F.3d 538, 544-45 (2d Cir. 1994); and *Latine v. Mann*, 25 F.3d 1162, 1165-66 (2d Cir. 1994).[2]

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[2] The Court is aware that statements within Fed. R. Evid. 801(d)(2)(D) are defined as "not hearsay," *id.* 801(d), rather than as within an exception to the hearsay rule. That is not relevant to Confrontation Clause analysis. In *Bourjaily*, the Supreme Court applied the Confrontation Clause analysis of *Ohio v. Roberts* to evidence admitted under Fed. R. Evid. 801(d)(2)(E), also defined by the Federal Rules of Evidence as "not hearsay." *See* 483 U.S. at 181-84. In the Confrontation Clause context, the Supreme Court has looked to the traditional definition of hearsay as " 'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' " *Lee v. Illinois*, 476 U.S. at 543 n.4 (quoting E. Cleary, *McCormack on Evidence*, § 246, at 584 (2d ed. 1972)).

The government suggests that there is no constitutional problem in admitting King's testimony against DKP because the burden of a conviction of DKP will fall ultimately on King who gave the testimony, but cites no authority for this view. (Gov't Letter to Court, June 18, 1997, at 2.) In the absence of controlling authority in point (and the Court has been made aware of none), the Court disagrees.

Corporations as well as individuals have been found to possess constitutional protections afforded to the accused by the Constitution. In *Martin Linen Supply*, for instance, the Supreme Court applied the Fifth Amendment's Double Jeopardy Clause to affirm the dismissal of criminal contempt charges brought against corporations, without any suggestion that the corporations might not be entitled to that protection. 430 U.S. at 568-576. In *United States v. Twentieth Century Fox Film corp.*, 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990), the Second Circuit found that a corporation, accused of criminal contempt, was entitled to the Sixth Amendment right to jury trial where the fine required the offense to be categorized as serious, 882 F.2d at 664-65. The court rejected the position that "corporate contemnors have no jury trial rights," and commented that [w]e decline to commit that Circuit to such an extreme position." *Id.* at 663 (footnote omitted). This Court believes that to completely disregard the Confrontation Clause in this case merely because King owns all of the stock of DKP would be an equally unacceptable extreme position.

To do so, moreover, would, in this Court's view, counter the public goal of reliability underlying the Confrontation clause. "The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. at 540. To deprive DKP of that right without satisfying the rule of *Ohio v. Roberts* would be to deprive the trial of DKP of that reliability.

The government does not even claim that King's testimony, taken as a whole, is reliable: indeed, in its closing arguments at the first trial, it repeatedly suggested that King testified untruthfully.

Further, since the first trial, the government has articulated its view that King, in his testimony at the first trial, incriminated DKP. (*See* Gov't Mem. at 4-5, 10 [argument in opposition to motion to dismiss as to DKP on ground of prosecutional vindictiveness].) The government plainly so construes King's testimony on November 6, 1995 (Tr. at 2328) quoted above. In *Lee v. Illinois*, the Supreme Court, commenting on its earlier decision in *Douglas v. Alabama*, 380 U.S. 415 (1965), said that its holding in the latter case "was premised on the basic understanding that when one person accuses another of a crime in circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U.S. at 541. While that presumption can be rebutted, *id.* at 543, the government has not attempted to do so. Thus, King's testimony, without cross-examination by DKP, must be presumed to be unreliable. The opportunity of King's counsel to question King at the first trial does not remedy the inability of DKP's counsel to cross-examine him, because King's counsel, in a case in which, by the government's choice, DKP was not a party, had no motive to develop King's testimony in matters that may have related to the culpability of DKP.

The lack of the reliability of King's testimony is more than a matter of unfairness to DKP: if King's testimony were admitted against DKP by ignoring the Confrontation Clause and *Ohio v. Roberts* and the cases following it, the public goals of the Confrontation Clause, *see Lee v. Illinois*, 476 U.S. at 540, would be undermined.

For the foregoing reasons, this Court considers the Confrontation Clause to apply on this motion.

For purposes of the present discussion, the Court must assume that King, although he will be present at the second trial, will be "unavailable" within the meaning of the *Ohio v. Roberts* rule. He has not advised the Court of an intention to testify, and clearly need not make any determination to testify or not until completion of the government's direct case. The Court does not consider on this motion what prior testimony might be admissible if King should testify.

The questions are (i) whether the proffered testimony is admissible under a provision of the Federal Rules of Evidence cited by the government, and, if so, (ii) whether the testimony may be admitted in the face of the Confrontation Clause challenge. For the evidence to be admitted under any of the cited provisions, the answer to both questions must be in the affirmative.

3.

King's testimony is not admissible against DKP under Fed. R. Evid. 801(d)(2)(D).

The testimony of King at the first trial appears to come within Fed. R. Evid. 801(d)(2)(D) to the extent that that rule is interpreted to mean that "an agent with authority to perform an act now has implied authority to make statements about that act." *Weinstein*, § 801.23[1], at 801-53 (footnote omitted). Nevertheless, King's testimony may not be admitted under Fed. R. Evid. 801(d)(2)(D) because, as applied to King's testimony at the first trial, in defense of criminal charges brought against him personally, that rule does not represent a "firmly rooted" exception to the hearsay rule, and the government has not shown that King's testimony is accompanied by "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66.

The government cites two cases from other circuits for the proposition that Fed. R. Evid. 801(d)(2)(D) represents a "firmly rooted" exception to the hearsay rule: *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992), and *United States v. Chappell*, 698 F.2d 308 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983). Those cases say, in a general way, what the 2government says they say. *See Saks*, 964 F.2d at 1525-26; *Chappell*, 698 F.2d at 312. The Court is not persuaded, however, that Fed. R. Evid. 801(d)(2)(D), in relation to King's testimony at the first trial, does represent a "firmly rooted" exception to the hearsay rule that this Circuit would recognize.

The drafters of the Federal Rules of Evidence, which became effective in 1975, did more in Fed. R. Evid. 801(d)(2)(D) than recategorize an exception to the hearsay rule as "not hearsay," *id.* 801(d)(2), as the Advisory Committee Notes to the proposed rules make clear. The new Federal Rules of Evidence broadened the exception as well.

The Advisory Committee Notes with respect to Fed. R. Evid. 801(d)(2)(D), reprinted in 5 *Weinstein* § 801 App. 01[2], at 801 App.-7, show that the new rule abandoned the "[t]he tradition," which was "to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment?" *Id.* That tradition, the Committee noted, was represented by a Second Circuit decision, *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965). *Id.* In place of the traditional view, the drafters of the rule followed, instead, "[a] substantial trend favor[ing] admitting statements related to a matter within the scope of the agency or employment." *Id.* (citations omitted). Thus, insofar as Fed. R. Evid. 801(d)(2)(D) admits statements by an agent not acting within the scope of his employment, to that extent the hearsay exception represented in that rule is hardly "firmly rooted,"

but rather an innovation, or, as the leading treatise puts it, "a stark break with common law." 5 *Weinstein* § 801.23[1], at 801-53. *See also* 31 Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6273, at 179 (interim ed. 1997) ("Previously [before the enactment of Fed. R. Evid. 801(d)(2)(D)] courts applied the traditional agency test in determining admissibility of statements by agents or servants, *i.e.*, whether the particular statement was authorized by the principal.") The Fourth Circuit has recognized this break with the "orthodox" rule found in Fed. R. Evid. 801(d)(2)(D). *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982).

The *Saks* and *Chappell* courts did not address the broadening of the traditional exception to the hearsay rule found in Fed. R. Evid. 801(d)(2)(D), nor is it clear that in those cases they were required to do so.

In *Saks*, two partners, Spruill and Saks, were charged with bank fraud. Spruill did not testify at the criminal trial. The court approved the admission against Saks of statements made by Spruill at depositions in a prior civil action.[3] The court described the context of Spruill's statements as follows:

> Spruill was in the process of settling partnership affairs when he testified in the deposition about the Corpus Christi loan. The partnership had been dissolved by the bankruptcy, but a large debt remained in dispute. Litigation over repayment of this debt was part

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[3] Both Spruill and Saks were parties to the civil litigation, 964 F.2d at 1517-18, and "Saks was present during at least part of these depositions," *Id.* at 1518 n.2. Although the *Saks* court does not mention it, it is worth noting that Saks, presumably, had both the right and the opportunity (although perhaps not an incentive) to cross-examine Spruill at the civil depositions.

> of winding up and closing out a partnership transaction. Spruill made statements in an effort to forestall repayment of the loan and reap damages because it was usurious. These statements were made *as agent* for Saks and were binding on him. They were therefore admissible against Saks under Rule 801(d)(2)(D).

946 F.2d at 1525 (emphasis added). Thus, the case can be read as admitting, under Fed. R. Evid. 801(d)(2)(D), statements that would have been admitted under the traditional hearsay exception. The cases relied on by the *Saks* court in finding the exception it applied "rooted in our jurisprudence," 964 F.2d at 1525, certainly reflect the traditional hearsay exception, and not the broadened scope of Fed. R. Evid. 801(b)(2)(D). The *Saks* court quoted *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), as stating the rule that "the declarations and conduct of an agent, *within the scope* and in the course of his agency, are admissible as original evidence against the principal, just as his own declarations or conduct would be admissible." 245 U.S. at 250 (emphasis added) (quoted at 964 F.2d at 1525). The *Saks* court also cited, at 964 F.2d 1525, *Vicksburg & Meridian Railroad v. O'Brien*, 119 U.S. 99, 104 (1886), a case which, again, states the traditional hearsay exception, *see* 119 U.S. at 104, and which found the hearsay statement of the agent (a railroad engineer) not admissible under the *res gestae* aspect of the exception. *Id.* at 104-5. The *Saks* court, explaining the application of *Vicksburg* to the case before it, made it clear that the admission of Spruill's testimony would have come within the traditional exception to the hearsay rule:

> *Vicksburg*'s limitation on the admissibility of an agent's declarations against the principal is not violated here. Spruill was testifying about past events, but *he did so in the course of fulfilling his duties as partner* to wind up the partnership's extant transactions. Thus he

> is different from the engineer in *Vicksburg*, whose authority did not include the power to make statements about prior trips and whose statements were not explanatory of anything in which he was then engaged.

964 F.2d at 1525 n.8 (emphasis added) (citation omitted).

The *Saks* court also noted that "agency theory underlies the co-conspirator exception" (citing *Anderson v. United States*, 417 U.S. 211 (1974), and *Bourjaily*, 483 U.S. at 188 (Brennan, J., dissenting)), 964 F.2d at 1525-26, and said that "[t]he two exceptions are hand in hand." *Id.* at 1526. It is true, of course, that the hearsay exception for co-conspirator statements is based on agency principles. But the analogy between that exception and the hearsay exception for statements of agents extends only to the traditional view of the latter. In *Anderson*, the Supreme Court explained:

> The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner.

417 U.S. at 218 n.6. (Citation omitted.) That analogy between the common law exception for co-conspirator statements and the common law exception for statements of agents does not carry over fully to the Federal Rules of Evidence, however. Fed. R. Evid. 801(d)(2)(E) continues the requirement of the common law exception that the statement be in furtherance of the conspiracy, *see* Fed. R. Evid. 801(d)(2)(E) and *Bourjaily*, 483 U.S. at 175, but Fed. R. Evid. 801(d)(2)(D) abandons the parallel requirement that the agent have been acting within the scope of his authority.

The *Chappell* court similarly found that Fed. R. Evid. 801(d)(2)(D) allowed the introduction of the prior testimony of an agent (deceased at the time of the criminal trial) on the ground that "[t]he similarities between coconspirators and agents are readily apparent, and we see no reason to differentiate between them for Confrontation Clause analysis purposes," although it went on to immediately add that "[i]n any event, there clearly were adequate indicia of reliability surrounding [the deceased witness'] testimony." 698 F.2d at 312.[4]

For the foregoing reasons, the Court finds that Fed. R. Evid. 801(d)(2)(D), as applied to a statement of an agent not made within the scope of his employment, does not represent a "firmly rooted" exception to the hearsay rule. King's testimony at the first trial, given in defense of charges against himself, personally, cannot be considered to have been made within the scope of his employment by DKP, or to have been authorized by DKP. Accordingly, the testimony quoted above cannot be admitted under the "firmly rooted"hearsay exception theory, and there is, furthermore, "a presumption against its trustworthiness." *Matthews*, 20 F.3d at 545.

Hearsay testimony not within a "firmly rooted" exception to the hearsay rule may be admitted, however, upon "a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66. The presumption, in other words, may be overcome. *Matthews*, 20 F.3d at 545. The search for particularized guarantees of trustworthiness is "by definition . . . case-specific." 5 *Weinstein* § 802.05[5] [b], at 802-27.

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[4] The testimony of the deceased witness, who had been a corporation's bookkeeper, was, apparently, only offered to lay a foundation for the introduction of the books and records of the corporation. *Id.*

Idaho v. Wright sets forth both the parameters and the ultimate object of a search for "particularized guarantees of trustworthiness." There, the Court said: "We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 820. And, the Court said, evidence admitted as possessing "particularized guarantees of trustworthiness . . . must be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821.

The government does not argue, however, that King's testimony is accompanied by "particularized guarantees of trustworthiness," *Ohio v. Roberts*, 448 U.S. at 66, or that the "totality of the circumstances . . . render [King] particularly worthy of belief," *Idaho v. Wright*, 497 U.S. at 820, or that King's testimony is "so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821. It argues, rather, that admissions within Fed. R. Evid. 801(d)(2) are not subject to a trustworthiness requirement, citing the Advisory Committee Notes to the proposed rule and *United States v. Goins*, 11 F.3d 441, 443-44 (4th Cr. 1993), *cert. denied*, 511 U.S. 1110 (1994). (Gov't Letter to Court, June 10, 1997, at 2-3.). The Advisory Committee Note does state that:

> No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Weinstein, § 801 App. 01[2], at 801 App.-6. *Goins*, following the Advisory Committee Note, concluded that co-conspirator statements were admissible under Fed. R. Evid. 801(d)(2)(E) even if the declarants did not have personal knowledge of the matters asserted.

Neither the Advisory Committee nor *Goins* addresses the Confrontation Clause, however. That the Clause does apply, and that *Ohio v. Roberts* must be followed, is demonstrated by *Bourjaily*, decided some twelve years after the Federal Rules of Evidence became effective. There, the Supreme Court considered the admissibility of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), which is within the scope of the Advisory Committee Note cited by the government and followed in *Goins*. Citing *Roberts v. Ohio*, the Court conducted a Confrontation Clause analysis, concluding that "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements." 483 U.S. at 183. If admissions under Fed. R. Evid. 801(d)(2) were not subject to any trustworthiness requirement, as the government suggests, then the Court would have had no need to conduct the analysis it did.

It follows that neither the Advisory Committee Note nor *Goins* relieves the government of showing either that Fed. R. Evid. 801(d)(2)(D), as applied to King's testimony at the first trial, represents a "firmly rooted" exception to the hearsay rule, or that King's testimony is accompanied by "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66. Since the government has not made the former showing, or even attempted to make the latter, King's testimony cannot be admitted against DKP under Fed. R. Evid. 801(d)(2)(D).

4.

King's testimony is not admissible against DKP under Fed. R. Evid. 803(24) or 804(b)(5). Those so-called "residual" exceptions have not been shown to be applicable because, among other reasons, the government has not shown, or even attempted to show, that King's testimony (or even any part thereof) "is more probative on the point for which it is offered than any other evidence which the proponent [*i.e.*, the government] can procure through reasonable efforts," *id.* 803(24)(B) & 804(b)(5)(B), as required by the terms of those Rules. Further, the "residual" exceptions represented by these Rules are not "firmly rooted," *Idaho v. Wright*, 497 U.S. at 817-18, and the government has not shown that King's testimony is accompanied by "particularized guarantees of trustworthiness," *Ohio v. Roberts*, 448 U.S. at 66, so that, even if King's testimony were otherwise admissible under Fed. R. Evid. 803(24) or 804(b)(5), its admission would be barred by the Confrontation Clause.

5.

King's testimony is not admissible against DKP under Fed. R. Evid. 804(b)(3).

The government seeks to introduce only "certain portions" of King's testimony under this Rule, and to do so only to the extent that they are "statements against King's pecuniary and proprietary interest and as statements which subjected his corporation to civil liability" (Gov't Mem. at 18), not asserting that the testimony is admissible as a statement against penal interest. The only portion of King's testimony that the government has identified as admissible under Fed. R. Evid. 804(b)(3) is King's testimony on November 6, 1995 (Tr. at 2328), quoted above. Accordingly, only that statement can be addressed by the Court.

There are several prerequisites to the admission of a statement as against the declarant's interest, applicable to all statements against interest. *See Weinstein*, § 804.06[4], at 804-48 — 804-55.

One is that "[t]he declarant must have perceived the facts to which the statement relates. This conclusion has always been inherent in the statement against interest exception, and is assured by [Fed. R. Evid.] 602." *Id.*, § 804.06[4][b], at 804-49. *See United States v. Lang*, 589 F.2d 92, 97-98 (2d Cir. 1978) (considering statement against penal interest). While King no doubt had general knowledge of much that took place at DKP, there has been no showing that the statement the government seeks to introduce, quoted above, is based on personal knowledge of "the facts to which the statement relates," *Weinstein*, § 804.06[4][b], at 804-49. The questions put to King do not even ask for factual information, but, hypothetical as they are, only ask for King's opinion on an assumed state of facts, which includes the assumption that King was without knowledge of the addition of the rider to the contract or its submission with the addition.

Also, for admission under Fed. R. Evid. 804(b)(3), "[a]t the moment the statement is made the declarant must believe that the statement is against the declarant's interest." *Weinstein*, § 804.06[4][d][i], at 804-51. Here, it is not at all clear that King would have thought, at the time of his statement, that it was against his interest, whether directly or through DKP. At that time, November 6, 1995, the offense conduct, which concluded on April 27, 1992 with the transfer to DKP of payment on its insurance claim (*see* Superseding Indictment, ¶ 20, Count Nine, at 8), was over three and a half years old, and the Vic Broad Syndicate, the alleged victim of that conduct, had shown no interest in pursuing a claim against DKP. No civil action had been filed, and the Vic Broad Syndicate's Claims Manager, Salter, had declined

even to come to the United States to testify in person at the first trial. King might well have thought, at trial, that nothing he might say, even if inculpatory of DKP, was "so far contrary to [his, or DKP's] pecuniary or proprietary interest, or so far tended to subject [him, or DKP] to civil . . . liability, that [King] would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3).

Further, it is not even clear that the statement was against King's or DKP's interest. "As reflected by the specific language used in Rule 804(b)(3), the statement against interest must be almost a direct, outright statement that the person was legally at fault." *United States v. Martino*, 648 F.2d 367, 391 (5th Cir. 1981). King's answers to the third and fourth of the questions put to him are, however, ambiguous. They are susceptible of the meaning the government attributes to them (inculpatory of DKP), but also of the meaning that, for anyone at DKP to add a rider to the contract for the Chavez/Brazier bout without King's knowledge or approval would have been "wrong," and to do that and to submit the contract would have been "deceptive" (Tr. Nov. 6, 1997, at 2328) irrespective of whether the rider itself was wrong or deceptive. The government did not clarify King's answers, and King's counsel, in the context of a case against King only, had no motive to do so.

Further, if King's statement is construed as the government construes it, then it is not admissible because "[i]f the statement or any part of it serves the declarant's interest, it is not admissible as a statement against interest." *Weinstein*, § 804.06[4][d][iii], at 804-54. At least the first two questions and answers within the statement the government seeks to introduce were, plainly, in King's interest: they are exculpatory of himself. The answers to the last two questions, as construed by the government, are inculpatory of DKP, but not of King; it was thus in King's interest, in

the circumstances in which he gave the testimony, to answer as he did.

For the foregoing reasons, the Court finds that the portion of King's testimony quoted above, identified by the government as admissible under Fed. R. Evid. 804(b)(3), is not admissible under that rule.[5]

If it were admissible, the Court, at this time, would exclude it under Fed. R. Evid. 403 because, as far as can be seen without any context in a second trial, its probative value is substantially outweighed by the danger of misleading the jury, for the reasons set forth above: lack of personal knowledge of the facts to which the statement relates, the possibility that King may not have thought the statement to be against his interest, ambiguity, and the exculpatory and therefore unreliable nature of the statement.

The Court does not consider the admissibility against DKP under Fed. R. Evid. 804(b)(3) of any statements of King other than that quoted above because the government has identified no others.

6.

The government also seeks to introduce King's November 6, 1995 testimony (Tr. 2328), quoted above, against DKP under Fed. R. Evid. 803(3). "King's testimony that the

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[5] As regards the Confrontation Clause, the Court notes that it does regard that portion of Fed. R. Evid. 804(b)(3) that exempts statements against "pecuniary" interest from the hearsay rule as "firmly rooted." *See Donnelly v. United States*, 228 U.S. 243, 273 (1912). Even so, the particular portion of King's testimony in question would not be admissible because it falls within the "presumptively suspect" category of statements exculpatory of the declarant but inculpatory of another that "must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. at 541. The government has not sought to rebut the *Lee* presumption by showing the statement's reliability.

submission of the fraudulent contract was 'wrong' and 'deceptive' was simply an expression of his own state of mind. His state of mind is binding on the corporation.'' (Gov't Letter to Court, June 10, 1997, at 3 (citing *United States v. Southland*, 760 F.2d 1366, 1376 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985)).) The government, at oral argument, explained its theory of the relevance of King's state of mind to the culpability of DKP:

> Now, remember his state of mind is attributable to the corporation. And to prove guilt on part of the corporation, the government can aggregate the acts of the employees. It can either attribute guilt to the corporation because of the guilt of any one employee who acts within the scope of and for the benefit of the corporation, or it can also take the state of mind of one employee, the acts of another, and if in the aggregate you've got all the elements of the offense, then you've got corporate liability. The fact that the president and one hundred percent shareholder of the company believed that this was deceptive, this clause, certainly proves one of the elements of the offense for the corporation. If we then prove that the corporation submitted that contract to Lloyd's, you then have another element. You've got knowledge of the deceptiveness, and then the submission of the misrepresentation. And, if we prove that it was done in the scope of and for the benefit of the corporation, there you have corporate liability. That comes in under 803 as a statement reflecting the state of mind of the corporation or, more directly, of the president which is attributable to the corporation.

(Transcript, June 13, 1997, at 24.) In other words, as the Court understands the argument, the government's position is that it may obtain a conviction of DKP if it proves that an employee or employees of DKP made fraudulent representations without knowledge of the fraudulent nature of the

representations or intent to defraud, if it proves that King, without knowing that fraudulent representations were being made and without fraudulent intent, believed that, if the representations in question were made, they would have been wrong or deceptive.

The relevance of King's state of mind turns on the correctness of the government's legal theory stated at oral argument, which is not self-evident, and which the government has not supported by any authority. To admit the testimony of King quoted above on the government's theory would require further briefing.

The testimony cannot be admitted under Fed. R. Evid. 803(3), however, for a different reason. The testimony, even if shown to be relevant, represents King's opinion based only upon an assumed state of facts, elicited by hypothetical questions. It is therefore inadmissible under *id.* 701.

While Fed. R. Evid. 701 does permit lay opinion testimony, the testimony must be "rationally based on the perception of the witness," *id.* 701(a), that is, "the witness must have personal knowledge of the facts from which the opinion is to be derived." *Swajian v. General Motors Corp.*, 916 F.2d 31, 36 (1st Cir. 1990). Here, the questions put to King did not elicit personal knowledge of any circumstances relating to the adding of the rider to the contract or its submission with the added rider. The first question, in fact, elicited that he had no personal knowledge. Since a lay witness' opinion must be based on personal knowledge, "unlike an expert, a lay witness may not answer hypothetical questions." 4 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence*, § 701.03, at 701-9 (rev. 2d ed. 1997) (footnote omitted).[6]

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[6] Counsel for King did not object to the hypothetical questions, but, in the context of the first trial against King only, he had no reason to do so. That in no way binds counsel for DKP, who does object. *(continued)*

If the testimony quoted above were admissible under Fed. R. Evid. 803(3), the Court, at this time, would exclude it under *id.* 403, for the same reasons set forth above in connection with the proffer of the same testimony under *id.* 804(b)(3).

The Court does not consider the admissibility against DKP under Fed. R. Evid. 803(3) of any of King's statements other than that quoted above because the government has identified no others.

7.

The government also seeks to offer unspecified portions of King's testimony as false exculpatory statements. False exculpatory statements, since they are not offered for the truth of anything asserted therein, are not hearsay, and are admissible. *Anderson v. United States*, 417 U.S. at 219-20. The admission of such statements for that purpose does not present a Confrontation Clause issue. *Id.* at 220 n.11. *See also Tennessee v. Street*, 471 U.S. 413-14 (1985).

That principle stated, however, the Court cannot consider the admissibility of any particular statements that may thus be admissible, because the government has not identified any. They will have to be considered as offered in context at trial.

(footnote continued)

The Court notes its understanding that a statement not offered to prove the truth of the statement, but to prove that it was made in order to show the state of mind of the declarant, comes within a "firmly rooted" exception to the hearsay rule, although the Court has not been supplied with any authority on the question. Nevertheless, for the reasons set forth *supra* at n.5, there remains an unrebutted presumption of the unreliability of the testimony in question that would preclude its admission against DKP.

8.

In sum: the government has failed to show that King's testimony is admissible in its entirety against DKP under Fed. R. Evid. 801(d)(2)(D), 803(24) or 804(b)(5). The government has failed to show that the portion of King's November 6, 1995 testimony (Tr. 2328), quoted above, is admissible against DKP under Fed. R. Evid. 804(b)(3) or 803(3). The government has shown that false exculpatory statements by King are, in principle, admissible, but since no such statements have been identified the Court makes no specific determinations of admissibility.

The Court next considers the admissibility of King's testimony against King only at a joint trial of King and DKP.

9.

Under Fed. R. Evid. 801(d)(2)(A), King's first trial testimony is admissible against King. The issue is the extent to which it may be admitted against King at a joint trial of King and DKP, since, as to DKP, King's testimony is, in very large measure at least, hearsay. Thus, the Court's ruling of August 22, 1997 that the present motion was moot in view of the dismissal as to DKP, implying that at a trial of King alone, his testimony would be admissible (Gov't Letter to Court, Oct. 20, 1997, at 1, n.1) is not dispositive. Nor is King's counsel's failure to object at the first trial (*id.* at 2) binding on DKP's counsel, who does object.

In some situations, instructions to the jury may adequately deal with such a problem. *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987). In others, it may not. *Bruton*, 391 U.S. at 135-36 (finding instructions to jury inadequate "[w]here the powerfully incriminating statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."); *Cruz v.*

New York, 481 U.S. 186, 193-94 (1987). In some situations in the latter category, a redaction of the extrajudicial statement may resolve the situation. *United States v. Tutino*, 883 F.2d 1125, 1135 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); *United States v. Kyles*, 40 F.3d 519, 526 (2d Cir. 1994).

The difficulty on the present motion is that the government, abandoning its original intention to identify portions of King's first trial testimony that it wishes to introduce at the second trial (Tr., June 13, 1997, at 2), has only recently advised the Court (and, presumably, counsel for defendants) that it seeks to introduce all of King's first trial testimony. (Gov't Letter to Court, Oct. 9, 1997, at 2.) That means, in effect, a read-back of two and a half days of testimony. (Tr. Nov. 2, 3 & 6, 1995, at 2054-428.) This difficulty is compounded by the fact that at least some of King's testimony is inculpatory of DKP (as has been seen with respect to the testimony quoted above, which is also exculpatory of King). Other testimony also may be inculpatory of DKP and may also be exculpatory of King. The problem is further compounded by the additional difficulty presented by most "evidentiary rulings on motions in limine": "that the court does not have the benefit of viewing the disputed testimony in the context of other evidence." *United States v. McVeigh*, 940 F. Supp. 1541, 1569 (D. Colo. 1996). Nor has any party cited a case involving the issue of the admission of all of a defendant's testimony given at a first trial at a second in which there is an additional defendant who was not present at the first.

In light of the above difficulties, the Court can only point to some general principles, and suggest a course of action.

A statement within King's testimony that inculpates DKP cannot be admitted unless the government shows that "the statement 'bears adequate "indicia of reliability."'" *United*

States v. Bakhtiar, 994 F.2d 970, 977 (quoting *Ohio v. Roberts*, 448 U.S. at 66). In the context of the present case, it seems obvious that "redacting [such a] statement so that it no longer connects the nondeclarant defendant [DKP] to the crimes charged," *Kyles*, 40 F.3d at 526, will be impossible. The unreliability of any statement inculpatory of DKP, of course, is only exacerbated if the statement is, at the same time, as in the case of the testimony quoted above, exculpatory of King.

DKP should identify to the government (and the Court) those portions of King's testimony that it regards as inculpatory of DKP, and, within that category of statements, such statements of King that it regards as, at the same time, exculpatory of King. DKP may also point out other reasons why specific segments of King's testimony should not be admissible, as, for instance by reason of Fed. R. Evid. 403. The government may then respond by pointing out, as to each such statement, why it believes it is admissible. The parties may agree on a schedule on which to do this; failing agreement, the Court will set one. The parties will also need to discuss, in the context of specific segments of King's testimony, the effectiveness of jury instructions regarding testimony admissible against King only.

As regards the present motion, King's testimony will not be admitted against King in its entirety because one portion of it, that quoted above, is, at the same time, exculpatory of King and inculpatory of DKP, and the government has not shown that the presumption against its reliability has been overcome.[7] The Court will, however, reconsider the motion

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[7] The Court is not, however, convinced that such testimony is barred on the ground that it is in the form of an opinion. A party's statement, offered against that party under Fed. R. Evid. 801(d)(2)(A), "may be in the form of opinion." *Weinstein*, § 801.20[2], at 801-38 (footnote

as to the balance of King's testimony upon the submissions described above.

SO ORDERED.

Dated: New York, New York
October 22, 1997

/s/ Lawrence M. McKenna
LAWRENCE M. McKENNA
U.S.D.J.

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omitted). Nor does the testimony, in the Court's view, amount to prohibited "opinions embodying legal conclusions." *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988). In *Scop*, the witness "made no attempt to couch the opinion testimony at issue in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations concerning 'manipulation' and 'fraud.' " *Id.* at 140 (citing *id.* at 136 n.1.) In *United States v. Espino*, 32 F.3d 253 (7th Cir. 1994), the offending question was: " '[Y]ou're admitting the conspircy, aren't you?' " *Id.* at 257. That question, the court said, required a "conclusion regarding the legal implications of [the witness'] conduct," *id.*, but, the court continued, "[a] more appropriately phrased question, such as whether [the witness] had an 'agreement' with [another person] to supply cocaine, could have avoided the problem of compelling the defendant to offer testimony requiring a legal conclusion." *Id.* Here, the government's questions, using the words "wrong" and "deceptive," do not incorporate statutory language from 18 U.S.C. § 1343, the only statute alleged to have been violated in this case, nor do they require a legal, as opposed to a factual, conclusion: "wrong" and "deceptive" (although perhaps ambiguous) are common words of factual characterization, much like the word "agreement." *Espino*, 32 F.3d at 257.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, City of New York, on the 4th day of March, one thousand nine hundred and ninety-eight.

[stamp-United States Court of Appeals for the Second Circuit, Filed March 4, 1998]

Present: HON: RALPH K. WINTER,
CHIEF JUDGE.
HON. WILFRED FEINBERG
HON. JON O. NEWMAN
CIRCUIT JUDGES.

97-1615

UNITED STATES OF AMERICA,
Appellant,

v.

DON KING AND DON KING PRODUCTIONS, INC.,
Defendants-Appellees.

ORDER

The petition for panel rehearing and the suggestion for *in banc* rehearing having been this day denied, the appellees' motion, filed February 9, 1998, for a stay of mandate pending disposition by the Supreme Court of a petition for writ of certiorari is granted only to the limited extent that the issuance of the mandate is stayed until March 10, 1998, to afford

appellant an opportunity of seek a further stay of mandate from the Supreme Court. We decline to postpone the impending criminal trial.

The appellant's motion filed February 12, 1998, for immediate issuance of the mandate and the appellees' motion filed February 13, 1998, also seeking immediate issuance of the mandate are both denied. Unless issuance of the mandate is stayed by the Supreme Court or a Justice of that Court, the mandate of this Court will issue on March 10, 1998.

FOR THE COURT,
GEORGE LANGE III, CLERK

By /s/ Lucille Carr

Lucille M. Carr,
Operations Manager